

Before the
Federal Communications Commission
Washington, D.C. 20554

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In Re Petition of United States Cellular
Corporation to Delete or Nullify the Effect of
Footnote Three

FEB 18 1993

FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARY

To: The Commission

**MOTION FOR THE RETURN OF USCC'S PETITION
TO DELETE OR NULLIFY THE EFFECT OF FOOTNOTE THREE**

Louisiana CGSA, Inc. ^{1/} hereby requests that the Commission return without consideration the Petition to Delete or Nullify the Effect of Footnote Three ("Petition") filed by United States Cellular Corporation ("USCC") on February 2, 1993 in *CC Docket No. 90-257*.^{2/} The relief requested in the USCC pleading is outside the FCC's jurisdiction and violates long-established rules of judicial and administrative procedure. There is no basis for consideration of the merits of this defective petition and it should be returned, thereby not creating a new appealable order in the case. Because LCGSA's motion requests the return of the USCC Petition without consideration of the merits, LCGSA does not respond on the merits in the instant filing. However, LCGSA hereby reserves that right in the event the Commission decides to consider the merits of the USCC Petition.

**I. USCC'S PETITION MAY NOT BE CONSIDERED BY THE
COMMISSION BECAUSE USCC'S ELECTION TO APPEAL
THE LA STAR DECISION TRANSFERRED JURISDIC-
TION OF THE CASE TO THE COURT**

USCC's Petition requests deletion or nullification of the effect of footnote three of the Commission's *La Star Decision*. That *Decision* found La Star ineligible to apply for

^{1/} New Orleans CGSA, Inc. ("NOCGSA") was the original competing applicant in the *La Star Cellular Telephone Company* proceeding, CC Docket No. 90-257 ("*La Star*"). In 1991, a *pro forma* merger of NOCGSA into Louisiana CGSA, Inc. ("LCGSA") was approved by the Commission and later consummated. See Public Notice, File No. 03030-CL-TC-1-92 (December 4, 1991). LCGSA was later substituted for NOCGSA in the *La Star* proceeding. *La Star*, 7 FCC Rcd. 3762, 3766 and n.22 ("*Decision*").

^{2/} This filing is being submitted on the date oppositions to the USCC Petition are due. As discussed herein, the FCC no longer has jurisdiction over the *La Star* matter, which is pending court review. Accordingly, LCGSA has recaptioned this pleading to reflect that fact.

Block B in the New Orleans MSA (St. Tammany Parish) and dismissed its application as unacceptable for filing. ^{3/} Because USCC has appealed the *Decision* to the U.S. Court of Appeals for the District of Columbia Circuit, the Commission no longer has jurisdiction over the *La Star* case and therefore the Petition may not be considered.

More specifically, on June 15, 1992, the Commission released its *La Star Decision*, affirming, in all respects, Judge Chachkin's findings of fact and conclusions of law concerning the wireline eligibility issue. In dismissing *La Star*'s application on eligibility grounds, the Commission also decided to defer resolution of certain character questions raised by NOCGSA in its exception — that USCC (and other) witnesses had not been candid in their sworn testimony before the ALJ and had concealed from the Commission the true control circumstances of the *La Star* applicant. ^{4/}

The Commission determined that dismissal of the *La Star* application made it unnecessary to reach — in the *La Star* docket — questions raised by NOCGSA concerning the conduct of *La Star*'s principals. However, the Commission expressly found that such matters could be raised in other cases. ^{5/} Specifically, the Commission ruled on NOCGSA's exception as follows:

^{3/} *Decision* at 3762, 3766.

^{4/} NOCGSA initially raised the character issue in its Proposed Findings of Fact and Conclusions of Law, filed April 8, 1991. The ALJ did not address the matter. In its Exception, NOCGSA argued that the Commission had an obligation under the Communications Act to address the misrepresentation/candor issue since serious character questions had been raised and the conduct was brought to the Commission's attention. See NOCGSA Exception to Initial Decision filed December 26, 1991, citing *inter alia*, *David Ortiz Radio Corp. v. FCC*, 941 F.2d 1253, 1260 (D.C. Cir. 1991).

^{5/} *Decision*, 7 FCC Rcd. at 3762, n.3. The Commission earlier warned USCC (and its parent Telephone and Data Systems, Inc. ("TDS")) that its determination on the wireline eligibility/control issue could be raised in other proceedings:

[W]e recognize that USCC and its parent, TDS, hold numerous other Commission licenses. Therefore, we agree that any Commission determination that USCC, or its parent TDS, controls *La Star* may be raised in other, subsequent proceedings. [*La Star*, 6 FCC Rcd. 1245 (1991).]

For the reasons that follow, we find that the record demonstrates that La Star is not controlled by a wireline-eligible carrier.^{3/} We therefore agree with the ALJ that La Star's application should be dismissed and NOCGSA's application should be granted.

^{3/} Because our conclusion in this regard results in the dismissal of La Star's application, we do not reach the question raised in NOCGSA's exceptions of whether La Star's principals lacked candor in their hearing testimony concerning the control of La Star. NOCGSA's exceptions and La Star's motion to strike those exceptions will be dismissed as moot. Questions regarding the conduct of SJI and USCC in this case may be revisited in light of the relevant findings and conclusions here in future proceedings where the other interests of these parties have decisional significance. *See Character Qualifications*, 102 FCC 2d 1179, 1223-24 ¶ 92(1986), *recon. denied*, 1 FCC Rcd. 421 (1986).^{4/}

By statute, USCC was given two choices after release of the Commission's *Decision*: (1) to file a petition for reconsideration pursuant to Section 405 of the Communications Act,^{7/} challenging footnote three's procedural ruling to defer resolution of the character issue to future proceedings; or (2) to file a Notice of Appeal of the *Decision* with the U.S. Court of Appeals for the District of Columbia Circuit pursuant to Section 402(b) of the Act, challenging the Commission's wireline eligibility/control determination.^{8/}

^{4/} *Decision*, 7 FCC Rcd. at 3762 and n.3 (second footnote omitted).

^{7/} See 47 U.S.C. § 405(a) which states in pertinent part:

After an order, decision, report, or action has been made or taken in any proceeding by the Commission . . . any party . . . may petition for reconsideration only to the authority making or taking the order, decision, report, or action. * * * A petition for reconsideration must be filed within thirty days from the date upon which public notice is given of the order, decision, report, or action complained of.

^{8/} Under the exhaustion doctrine, only those matters which USCC raised in its Exceptions with the Commission could be judicially reviewed. Thus, USCC was required to file a petition for reconsideration of footnote three before seeking judicial review. See 47 U.S.C. § 405(a) (The filing of a petition for reconsideration shall be a
(continued...)

On July 10, 1992, USCC elected to appeal the FCC's *Decision* to the U.S. Court of Appeals for the D.C. Circuit. ^{8/} USCC did *not* file a petition for reconsideration with the FCC contesting footnote three of the *Decision*; nor did it request a stay of the effectiveness of footnote three. ^{10/}

Because USCC elected to appeal the *Decision* — and the *La Star* appeals remain pending — the Commission no longer has authority over the *La Star* docket and thus cannot modify the *Decision*. Accordingly, USCC has no jurisdictional basis to contest the propriety of footnote three because the appeals lodged transferred the case to the U.S. Court of Appeals for the D.C. Circuit — which now has jurisdiction over the matter. ^{11/}

^{8/}(...continued)

condition precedent to judicial review of such order where the party seeking review “relies on questions of fact or law upon which the Commission . . ., has been afforded no opportunity to pass.”); 47 C.F.R. § 1.106(m). *See also Coalition for the Preservation of Hispanic Broadcasting v. FCC*, 931 F.2d 73 (D.C. Cir.) (*en banc*), *cert. denied*, 112 S. Ct. 298 (1991).

^{9/} On July 14, 1992, *La Star* filed its own appeal with the court. The two *La Star* appeals have been consolidated and are pending court consideration. *See Telephone and Data Systems, Inc. v. FCC*, No. 92-1291 (D.C. Cir. filed July 10, 1992); *La Star Cellular Telephone Co. v. FCC*, No. 92-1294 (D.C. Cir. filed July 14, 1992).

^{10/} Section 405 of the Communications Act warns that even if a petition for reconsideration is filed, the effectiveness of the underlying order is not stayed without the filing and grant of a separate request for stay. *See* 47 U.S.C. § 405(a):

No such application [petition for reconsideration] shall excuse any person from complying with or obeying any order, decision, report, or action of the Commission, or operate in any manner to stay or postpone the enforcement thereof, without special order of the Commission.

^{11/} *See* 47 U.S.C. § 402(b) and (c): “Upon filing of [the] notice [of appeal], *the court shall have jurisdiction of the proceedings and of the questions determined therein.* . . .” (emphasis added). On July 10, 1992, USCC filed its Notice of Appeal and attached the entire Commission *Decision* as the order on appeal. Moreover, pursuant to Fed. R. App. Pro. 17, on August 27, 1992, the FCC filed a certified list of items in the *La Star* record with the Court of Appeals, symbolizing its transfer of the record in the case to the court. The *La Star Decision* was included as one of the last items in the record transferred to the court by the FCC.

The *La Star* docket is closed, the *La Star* and NOCGSA applications are no longer pending, and the FCC has issued its final decision in the case. The USCC Petition is thus not properly before the Commission in the context of the *La Star* docket. If the Commission could modify orders which are on appeal, as the USCC Petition seems to request, the Court of Appeals would be confronted with a moving target and multiple appeals of the same Commission order would be produced.

For judicial economy reasons and to avoid piecemeal review of FCC orders, it is well-established that a party aggrieved by an FCC order cannot simultaneously request reconsideration by the Commission and judicial review by the Court of Appeals.^{12/} USCC is seeking administrative reconsideration of *Decision* footnote three while it has pending, simultaneously, an appeal of the very same decision before the court of appeals. Consideration of the untimely USCC Petition would thus clearly violate the tenets of *TeleSTAR* as it would render the underlying *Decision* non-final — and non-reviewable. In fact, and pursuant to USCC's notice of appeal, the *La Star Decision* is final and is pending court review. USCC has elected its remedy and it cannot now seek Commission reconsideration.

Moreover, even if the Commission had continuing jurisdiction to consider the USCC Petition, the exhaustion of administrative remedies requirement embedded in Section 405 of the Communications Act would be violated by FCC consideration of the instant Petition. Parties who fail to raise their arguments in a petition for reconsideration, as required by statute, could merely ask the Commission to change a portion of the Order they previously failed to contest in a timely filed reconsideration petition, thus subverting the statute. Simply put, that is what USCC is asking the Commission to do here.

USCC had a well-known and exclusive remedy at law to challenge the validity of the *La Star Decision's* footnote three — to seek timely administrative review. USCC

^{12/} *TeleSTAR, Inc. v. FCC*, 888 F.2d 132, 133 (D.C. Cir. 1989) (“[A] pending petition for administrative reconsideration renders the underlying agency action non-final and hence unreviewable, with respect to the petitioning party.” (quoting *United Transportation Union v. ICC*, 871 F.2d 1114 (D.C. Cir. 1989))).

failed to avail itself of that remedy and now seeks Commission intervention. No explanation is offered why USCC did not file a timely petition for reconsideration. ^{13/}

II. FOOTNOTE THREE PERMITS USCC TO ADDRESS THE REMAINING CHARACTER ISSUE IN RELEVANT PROCEEDINGS

A. USCC May Raise All Pertinent Matters and Fully Participate in Those Proceedings Where Footnote Three is Raised

While USCC is now precluded from challenging the procedures adopted by the Commission in footnote three of the *La Star Decision*, USCC can raise pertinent evidence/arguments in the various pending FCC proceedings in which footnote three has been raised. Thus, USCC is not without avenues to pursue resolution of the issues presented in footnote three.

In fact, USCC *has* addressed these matters in FCC proceedings where the issue has arisen. USCC admits these issues have been raised in Commission proceedings involving the Baton Rouge, Louisiana MSA (MSD 92-39) ("*Baton Rouge*"); ^{14/} the Biloxi, Mississippi MSA (MSD 91-26); the Manchester/Nashua, New Hampshire MSA (MSD 92-22); and the New

^{13/} In fact, the USCC Petition — filed some 7½ months after expiration of the petition for reconsideration filing time period — is not even accompanied by a motion for leave to file. The USCC Petition also exceeds the page limit imposed on reconsideration petitions. See 47 C.F.R. § 1.106(f). These are additional grounds for returning the Petition. If the USCC Petition is entertained, there would be one appeal of the Commission's *Decision* and a likely second appeal of the Commission's *Decision* through the artificial vehicle of USCC's untimely Petition seeking reconsideration of footnote three. To further confuse matters, if USCC's Petition were entertained, *La Star itself* might also petition the Commission to delete/nullify footnote three — thus raising the prospect of *three* separate appeals involving the same Commission *Decision*.

^{14/} In this proceeding, LCGSA has requested an order to show cause why USCC should not be required to cease and desist and divest its limited partnership interest in the Baton Rouge MSA Limited Partnership ("BRMSLP") for violations of the Communications Act and Commission rules. LCGSA has raised *La Star* footnote three in the Baton Rouge proceeding, and has asked the Commission to find that USCC lacks the requisite character qualifications to hold any interest in the BRMSLP.

York 4 RSA (File No. 11621-CL-P-562-B-89). ^{15/} In these proceedings, USCC has been given a full opportunity to respond to the merits of the *La Star* character charge in the context of an authorized pleading cycle, and the company has in fact responded on the merits. ^{16/}

Thus, and as contemplated by *La Star* footnote three, USCC has been given authorized opportunities to respond to the character charge in other proceedings, and it has availed itself of these opportunities. These proceedings provide a fully appropriate setting for consideration and resolution of the pending character issue. Moreover, any FCC determinations in such proceedings concerning USCC's *La Star* conduct and its impact on the company's FCC qualifications will also be subject to possible reconsideration and/or judicial appeal. USCC's rights are fully safeguarded under the procedure adopted by the Commission.

**B. USCC May Also Challenge Any Conditional Grant
Via Specified Commission Procedures**

A further principal concern of USCC is that it has received conditional grants of uncontested applications. ^{17/} Despite USCC's protestations, again it has an available remedy to challenge the propriety of the conditional grants — through the filing of a timely petition for reconsideration of the conditional grant. Thus, under Commission rules USCC may challenge such grants by returning the instrument of authorization and filing a petition for reconsideration. ^{18/} Of course, USCC must still meet timing requirements for such

^{15/} See USCC Petition at 6-7.

^{16/} See Opposition of USCC to Request for an Order to Show Cause, File No. MSD 92-39, filed Aug. 12, 1992, at 32-36; USCC's Response to Second Supplement, File No. MSD-91-26, filed November 17, 1992, at 3-6; and Consolidated Reply of New York RSA No. 4 Limited Partnership, File No. 11021-CL-P-562-B-89, filed September 2, 1992, at 25-27.

^{17/} See USCC Petition at iii.

^{18/} 47 C.F.R. § 22.32(d).

filings, and must turn in the grant before filing for reconsideration. ^{19/} USCC provides no explanation for why these procedures are ineffective.

Furthermore, while USCC is unhappy that the conditional grants place such grants under a "potential cloud for the indeterminate future," ^{20/} the conditions merely reflect the fact at hand — that *La Star* footnote three contemplates future resolution of *La Star* character issues involving USCC. Thus, the grants fairly apprise parties doing business with USCC of the pendency of this matter.

III. THE USCC PETITION IS ALSO A DEFECTIVE ATTEMPT TO BOLSTER THE ADMINISTRATIVE RECORD ON THE WIRELINE ELIGIBILITY ISSUE

Finally, USCC's Petition attempts to relitigate the Commission's wireline eligibility/control determination ^{21/} and thus fails to comport with FCC procedures. First, as previously stated, USCC has appealed the wireline/control issue to the court and, as a jurisdictional matter, this issue cannot be reargued at the Commission (as USCC attempts with its Petition). There is no open *La Star* docket.

Second, USCC's effort to supplement the evidentiary record in the *La Star* proceeding also subverts the rules pertaining to the orderly adduction of evidence. Hearing procedures are governed by rigid procedural rules which protect the integrity of the fact-finding process. The evidentiary record in *La Star* was closed on January 30, 1991, after *La Star* filed exhibits and gave testimony on the wireline eligibility issue. A number of USCC principals sponsored *La Star* exhibits and gave testimony on the wireline eligibility issue and USCC fully participated in this matter. Thereafter, on April 2, 1991 the *La Star* record was reopened and USCC was given an independent opportunity to supplement the record with its own separate exhibit/evidence on the wireline eligibility issue. The exhibit was received

^{19/} *Id.*

^{20/} USCC Petition at 6.

^{21/} See, for example, USCC Petition at 30, 32, USCC Appendix 1.

into the record — exactly as proffered — and the record was again closed on April 2, 1991. ^{22/}

USCC's new proffer of evidence on the wireline eligibility issue — under the guise of its Petition — is simply years too late. In *RKO General, Inc. v. FCC*, ^{23/} the Court of Appeals rejected a similar attempt to reopen the record after the fact, stating:

Appellant took its chance that the Commission on the existing record would find [in its favor]. Now that the decision has gone against it, the appellant wants a chance to persuade the Commission with a supplemental record. We cannot allow the appellant to sit back and hope that a decision will be in its favor, and then, when it isn't, to parry with an offer of more evidence. ^{24/}

Similarly here, the Petition is an untimely and a procedurally defective proffer of evidence long after the record has closed. Thus, USCC's Petition should be returned. ^{25/}

^{22/} See *La Star*, CC Docket 90-257, FCC 91M-1194 (released April 4, 1991).

^{23/} 670 F.2d 215 (D.C. Cir. 1981), *cert. denied*, *sub nom. Multi-State Communications Inc. v. FCC*, 457 U.S. 1119 (1982).

^{24/} *Id.* at 232 (quoting *Colorado Radio Corp. v. FCC*, 118 F.2d 24, 26 (D.C. Cir. 1941)).

^{25/} At one point in its Petition USCC states that:

If . . . the Commission believes that additional evidence must be taken to resolve questions of fact left unanswered in *La Star* concerning the character of USCC, then the Commission should do whatever is necessary in the proceeding where those questions arose to obtain the evidence needed to answer them.

[USCC Petition at 55.] LCGSA does not believe further *La Star* hearings are necessary regarding the candor of USCC's witnesses concerning their testimony on the true controlling partner in *La Star*. As noted, the *La Star* docket is closed. Moreover, USCC's witnesses have fully testified as to the basis for their testimony concerning SJI control. In fact, USCC itself has argued that the facts involved are "substantially not in dispute." [USCC Baton Rouge Opposition at 34.]

However, because demeanor evidence is relevant to the candor issue, LCGSA agrees that Judge Chachkin, the *La Star* Presiding Officer, should be asked to render a summary decision on the candor issue. An appropriate context would be a limited referral to Judge Chachkin in the *Baton Rouge* proceeding. That case also involves questions regarding USCC's simultaneous acquisition of its Baton Rouge and *La Star* ownership interests. In *Baton Rouge* a further candor issue has surfaced regarding
(continued...)

CONCLUSION

For the foregoing reasons, USCC's Petition should be returned as defective. ^{28/}

Respectfully submitted,
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^{25/}(...continued)

the circumstances of USCC's acquisition of a 52% interest in BRMSLP without prior approval of the Commission under Section 22.39(a)(1) of the Rules (after USCC's prior involvement in the *JHP Partnership* proceeding — a case involving the same issue). *JHP Partnership*, 3 FCC Rcd. 4079 (CCB 1988), 4 FCC Rcd. 5438 (ALJ 1989).

^{26/} See Correspondence from Gregory J. Vogt, Chief, Mobile Services Division, Common Carrier Bureau to Peter M. Connolly, Esq. (Counsel to USCC) (May 5, 1992), returning, without consideration, USCC's application for consent to transfer of control of the Baton Rouge MSA Limited Partnership from BellSouth Mobility Inc to Capitol Cellular, Inc. (submitted by USCC without execution of the transferor's portion) ("The above-referenced application . . . is returned herewith as defective. . . .").

CERTIFICATE OF SERVICE

I, Jo-Ann Grayton, a secretary in the law firm of Wilkinson, Barker, Knauer & Quinn, hereby certify that I have this 18th day of February 1993 sent copies of the foregoing to the following by First Class United States Mail, postage prepaid:

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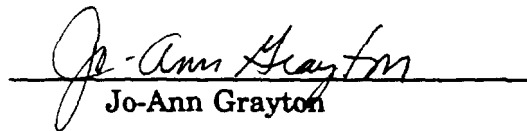
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